

LAW'S DELAYS, LAWYERS' DELAYS AND
FORWARDED CASES

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JUST now we seem to be at the crest of another wave of criticism of "law's delays." Once more judges and lawyers concern themselves with the general question of the administration of law. Bar associations, judicial councils and committees bestir themselves to "recognize" the "evil," and to study, to report, and to recommend reform of court practice and procedure. Time studies are had in the disposition of docketed cases. Technicalities of procedure are sought to be eliminated. Jury trial is damned and squeezed. New judges are added; the pay scale of the judiciary is increased. As ever, speed in the disposal of cases pending in court is sought for by accelerating the present system of courts—a system inaugurated in Anglo-American jurisprudence about the year 1066.

As ever heretofore, judges and lawyers, almost exclusively, constitute the personnel of these reform bodies. Why should this be so? Is it true that there are no other professional or business men who are sufficiently competent, or sufficiently concerned, to take a hand in this program? If "law's delays" always have been an "evil," and if only judges and lawyers have heretofore dealt with the "evil"—and unsuccessfully, it is so often alleged,—is it not plausible to suggest a resort to "outsiders?" If business men can organize and reorganize industrial units into economical and profitmaking enterprises; if other institutions of the political state are efficiently organized along the lines of private enterprise, it scarcely seems absurd to propose the introduction of the skill of such men into our state institutions for the administration of law. If such men are reluctant to approach the task single-handed, may it be suggested that the "evil" is of sufficient importance to merit the study and service of their technical associations. Certainly judges and lawyers will not claim exclusive rights to deal with the problem. Certainly their record of past performance warrants to them no prerogatives in the premises. Certainly it is not merely a "legal" problem.

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But whether or not the legal profession only is to deal with the case, it is the thesis of this article that delay in the disposition of docketed cases is only one cause for complaint in the administration of law, at least in administration of the law affecting commercial cases, and that any major operation upon court procedure, pleadings and jury trial will scarcely reach the roots of the disease because there is evidence which indicates that they lie in several unfortunate time-begotten habits of at least some practicing lawyers. These habits involve not only their handling of cases pending in court, but also their conduct in handling clients' business prior to the commencement of any action. While more attention will be given in this article to the latter part of this criticism, the first point will not be passed unnoticed.

These conclusions are drawn from and based upon the experience of a client whose records of cases pending in the courts (or in the hands of lawyers) of the states of the United States the writer was privileged to examine during the month of September 1927.

Client is the president of a New Jersey corporation with principal place of business in New York City. He is engaged in manufacturing and selling a machine which is purchased for use in department stores, drug stores and like places of business. He has had twenty-five years' experience in his business. The number of forwarded cases herein referred to represents an insignificant percentage of the total number of sales in his business for the same period.

Client's dealings with his buyers are as follows: A machine is shipped from New York to a place designated by the buyer, freight-prepaid, on a contract commonly known as "on sale or return." By the terms of this sales-contract, the buyer purchases the machine and the purchase is closed by delivery of the machine to the railroad company at New York. The contract contains a provision, however, that if the buyer, for any or no reason, desires to return the machine he may do so by returning it by freight, freight-collect, within thirty days after it has arrived at the place designated by the buyer. After this thirty-day option has expired, if the machine has not been returned as agreed, the purchase price becomes payable at the rate of \$15.00 per month.

Out of these transactions come the pending cases about to be reviewed. Client's claim in these cases is for money—the total purchase price, or some balance of the price. He forwards these

cases with necessary papers and advance suit-fees, which are in accordance with the scale of the Commercial Law League of America, to attorneys in the several states of the United States.¹ His forwarding letter not only reports the claim and client's requests and demands upon buyer for payment and buyer's default, but it also gives specific instructions as follows:

"Since debtor was notified of the consequences of non-payment, and then drove the claim to legal action, under no circumstances, will an offer of settlement be entertained, other than complete satisfaction of the account in accordance with the original agreement."

Then follows the clause, generally in large type: "Unless paid on your first demand, please enter suit;" and finally: "If case is lost, take appeal."

On September 15, 1927 client's special ledger account for these cases showed that two hundred and thirty-one claims had been forwarded to attorneys for collection between June 28, 1923 and April 30, 1927. His claims in these cases aggregated \$38,279.-75, making the average amount of each claim \$165 in round numbers.²

That the records of these cases show delays caused by congested court dockets is beyond question. They indicate quite as clearly, however, some avoidable causes of delay blamable to the practicing lawyers involved, and some, or at least one, cause of delay blamable to the judicial system. Conclusions in point, drawn from these records, may be enumerated as follows:

First. That many of these cases aid to congest the calendars of the trial courts by being brought to trial because of the ignorance of attorneys in the law applicable to the case and because of their superficial investigation of the law and facts of the given case before they advise their client to litigate. Indeed, client, during his twenty-five years' experience, found himself so frequently the victim of lawyers' "curb-stone" opinions concerning his side of the case, that he has adopted the practice for the past several years of inserting in his forwarding letter a summary of the law applicable to his contract, and of enclosing a model complaint for his attorney to follow. The records of his litigated

¹Client is a member of the Commercial Law League of America. The lawyers to whom he forwards his cases are also almost always League members.

²While these claims are small, the writer found only three cases in client's records where attorneys refused to accept or having accepted returned promptly such claims when offered to them. Having accepted them they have kept them.

cases very clearly indicate that defendants' attorneys are no better informed concerning their cases than were client's own attorneys, as formerly untutored.

Second. That it is equally inferable from client's records, on the other hand, that some defendants knowingly follow the advice of a fully-informed attorney and "stand" a law suit for the very purpose of taking advantage of congested court calendars. These cases illustrate what seems to be a general principle of practice: (1) that there is *always a chance* to win at the *game* of trial practice, and (2), that while *legal* interest and costs will be taxed to the defendant in case of an adverse judgment, the capital-use-value of the money to the defendant for the one, two, three or more years of delay before final disposition of the case is much greater; and (3), that a manifestation of a will to litigate is generally an aid in bargaining a compromise.

Third. That it is likewise clear from client's records of litigated cases, that his attorney and opposing counsel assume *no common responsibility* to keep the trial proceedings free from legal error. The oft repeated reference to attorneys as "officers of the court" with its connotation that their responsibilities are more than to act as mere agent and champion for their respective clients, is more euphonious than realistic. A summary of a single case in a municipal court of one of the largest cities in the United States will suffice to illustrate the criticism made. Client's claim was for \$150.00. Tried before a jury, verdict for defendant. Motion to set aside verdict and for new trial. Motion granted. On second trial plaintiff secured verdict. Motion by defendant to set aside verdict and for a new trial. Motion granted and new trial ordered. On third trial defendant won a verdict. Motion by plaintiff to set aside verdict and for a new trial. Motion denied and plaintiff filed notice of appeal. Clearly any such record of the conduct of litigation by the "officers of the court" suggests a change from a competitive bar wherein its members engage only to win cases.

Fourth. The last criticism, suggested by the records of client's cases, relating to delays in the disposition of docketed cases, tends to pass from the shoulders of these practicing lawyers to the "system." It singles out that notorious character in American law administration called the justice of the peace. Provincial in general experience, active as a local politician, and generally professionally intelligent except as to the most elementary rules of

law applicable in his locality, he presumes to judge litigated cases. Of course he can do no permanent harm nor good where the losing party can appeal as of course and have a trial de novo. The delays of these justices, however, counting the thirty or sixty days time allowed for appeal from their edicts, conservatively estimated, has meant a delay of five to six months in client's litigated cases. Not a case has been noted in his records where the parties have accepted the determination of the justice of the peace as final. Of course opportunity for appeal as of right may invite appeal. The following letter from Wisconsin attorneys to client indicates what may happen at the hands of a justice of the peace:

"We regret that we have not as yet secured the J. P.'s written decision. We cannot push him as hard as we would a delinquent debtor, but must approach him in a diplomatic way and wait his convenience. We have much trouble locally with all the justices and there is no choice between them. . . . Each time we tackle him at his office on the proposition, he at once orders the record set before him and states he will get out his opinion at once. An interruption then occurs and nothing is done."

Allowing for the deference and reticence of these attorneys, it remains to note that this justice tried the case on or before March 2, 1926 and rendered his judgment on February 10, 1927.

We may now turn from a consideration of law's delays in these cases in the particular of disposition of docketed cases, to client's experience with his lawyers in handling his business prior to beginning any action. As client's uniform instruction is: "Unless paid on your first demand, please enter suit," question arises: how well do lawyers who accept his business comply with his instructions?

While some lawyers, perhaps, are at all times diligent with their client's business and alert to execute instructions, and while most lawyers, probably, are not dilatory with clients' cases sometimes, the evidence gathered from this client's records indicates that at least once many lawyers have not been diligent but have been inexcusably dilatory with client's cases prior to trial and in bringing them to trial.

With this thesis in mind let us turn to a somewhat detailed report of client's 231 cases, analyzed according to the year in which they were forwarded to attorneys, as follows:

1923

Five cases were forwarded to attorneys on or before June 28, 1923. Following is the status of these cases as of September 15, 1927:

One case—debtor had made a partial payment upon suit filed.

One case—client had a favorable judgment; execution returned unsatisfied; trustee appointed to administer debtor's estate.

One case—client had a favorable judgment by a justice of the peace; defendant's appeal pending. This case is reported, *infra*, as Case Number Six.

Thus are three cases accounted for; in the remaining two cases it is not certain that a suit had even been filed.³

1924

Thirty-eight cases were forwarded to attorneys during the year 1924. Following is the status of these cases as of September 15, 1927:

One case—debtor had made a partial payment. No suit filed.

Six cases—credited in full⁴ between November 16, 1926 and June 20, 1927. One was paid by debtor without suit filed, one paid when suit was filed, one paid on judgment procured by client, one on judgment for client in a new trial, one paid on a favorable judgment on the pleadings and on the trial, one after default judgment for client by justice of peace was affirmed on appeal by defendant. Execution was returned unsatisfied in last case and claim charged to profit and loss.⁵

Five cases—client had procured favorable judgments between September 22, 1924 and November 26, 1926 with status as follows on September 15, 1927: three cases had execution pending, one in receivership administration, and in one defendant's motion for new trial denied; his appeal in supreme court pending.⁶

³The statement is made thus conservatively in order to include not only those cases where the records clearly show that no suit has been filed but also those cases where intimations are made by attorneys that suit has been filed, but it is doubtful from the record of the correspondence if these intimations are true. See, for example, Cases Number Three and Four which are reported *infra*.

⁴This is, of course, a gross credit.

⁵It may be stated that the comparative amount of litigation-in-court involved in the several cases will not account for the chronological order of closing these cases. For example, the case settled without suit was fourth in point of time, and the last case cited was closed first.

⁶The judgments referred to in Case Number Four, reported *infra*, are omitted because of uncertainty concerning the report of them.

Two cases—client had sustained two adverse judgments before justices of the peace, in one client lost on appeal and appeal to next higher court pending; in latter client lost on appeal and no further appeal is possible. This account remains to be charged to profit and loss.

Three cases—suit had been filed.⁷

Twenty cases—apparently suit had not been filed.⁸

1925

Sixty-two cases were forwarded to attorneys during the year 1925. Following is the status of these cases as of September 15, 1927:

Four cases—debtors had made partial payments between March 16, 1925 and February 23, 1927. In two of these cases the payments were bankruptcy dividends. No legal proceedings had been instituted.

Five cases—credited in full⁹ between May 25, 1925 and May 5, 1927. In four of these cases no legal proceedings were instituted, one of which was charged to profit and loss. In fifth case client sustained adverse judgment at trial court; lost also on appeal. No further appeal available. Charged to profit and loss.

Eight cases—client had procured favorable judgments with status as follows on September 15, 1927: five cases were pending execution for part or whole of the judgment; two executions returned unsatisfied; one defendant appealed from the judgment and lost; his appeal to supreme court pending.¹⁰

Eleven cases—client sustained adverse judgments between September 10, 1925 and February 10, 1927. In six of these cases client's first appeal was pending, in four his second appeal was pending, in one his third appeal.

Eight cases—suit had been filed.

Twenty-six cases—apparently no suit had been filed.¹¹

1926

Eighty-nine cases were forwarded to attorneys during the year 1926. Following is the status of these cases as of September 15, 1927:

⁷Case Number Two, reported *infra*, is included here.

⁸See note 3, *supra*.

⁹See note 4, *supra*.

¹⁰Case Number Five, reported *infra*, is included here.

¹¹See note 3, *supra*.

Four cases—debtors had made partial payments between May 5, 1927 and July 15, 1927. No legal proceedings instituted. In one case the partial payment was a bankruptcy dividend.

Twenty-one cases—were credited in full.¹² Five were paid without suit filed, four were settled on suit filed, six were settled on first judgment, two on execution, one while on appeal by client from adverse judgment, two while on appeal by defendant from judgment for client, and one on execution on judgment on first appeal.

Seven cases—client had recovered favorable judgments with status as follows on September 15, 1927: in two cases defendant appealed, in two, execution returned unsatisfied, in one execution pending, debtor had absconded, in one debtor was in bankruptcy proceedings, and in one debtor appealed and parties compromised claim.

Three cases—client had sustained adverse judgments, one reversed and judgment rendered for client upon which execution had issued, in second judgment reversed on appeal, but judgment conditional and client moved for new trial, which motion pending, adverse judgment sustained on first appeal, new trial procured, verdict therein for plaintiff, defendant's motion for new trial granted, client appealed to supreme court—pending.

Twelve cases—suit had been filed.

Forty-two cases—apparently no suit filed.¹³

1927

Thirty-eight cases were forwarded prior to April 30, 1927. Following is the status of these cases as of September 15, 1927:

Two cases—debtors had made partial payments. No legal proceedings instituted.

Eight cases—were credited in full.¹⁴ In five of these cases payments were made without suit filed; two were settled on suit filed and one on execution on first judgment.

One case—suit had been filed.

Twenty-seven cases—apparently no suit filed.¹⁵

Thus client had had such legal service, under his instructions to bring suit, as is indicated in ninety of the two hundred and thirty-one cases. In one hundred and forty-one cases no suit had been filed

¹²See note 4, *supra*.

¹³See note 3, *supra*.

¹⁴See note 4, *supra*.

¹⁵See note 3, *supra*.

and one hundred and seventeen cases of this last group have not been accounted for in the foregoing summary.¹⁶ What of these cases?

This question refers us to the lawyers who have these claims. How are they handling these claims? They have received the initial suit fee, instructions to make one demand and if payment refused to sue immediately, and if the case is lost to appeal. The diaries of the following cases are taken from client's files and are offered for what they obviously suggest. They illustrate the criticism that client's lawyers are inexcusably dilatory in handling business prior to trial in any court and in bringing cases to trial.

Case Number One—An Illinois case. Sale was made May 8, 1924. Claim was forwarded for client by a local attorney on August 11, 1924 together with \$5.00 suit fee and the usual instruction: "Please make single demand for payment and if refused enter suit."

August 14, 1924: Attorney acknowledged receipt of claim, papers and check.

September 13, 1924: Forwarding attorney inquired if claim had been collected or if suit had been commenced. No reply.

September 30, 1924: Same inquiry by forwarding attorney. No reply.

November 18, 1924: Inquiries of September 13th and 30th repeated. No reply.

February 18, 1925: Previous inquiries repeated. No reply.

March 3, 1925: Forwarding attorney wrote: "I cannot understand your attitude or what prompts you in refusing to extend to me an ordinary courtesy. You will, therefore, be good enough to return the papers in this matter to me by return mail. Failure to receive these before the 10th inst., will compel me to report this to the list from which your name was taken."

March 4, 1925: Reply: "I find I cannot do you any good with this account and return all the original papers herewith, together with the check for five dollars sent for court costs."

Just before client sold to the buyer in this case, client had procured a credit rating report from the above attorney. The report contained the following question: "If account is not paid at maturity can collection be made?" This attorney had answered: "Yes."

¹⁶Possibly a maximum of ten of these cases may excuse suit filed as of September 15, 1927 because of indulgence to debtor directed or approved by client.

Case Number Two—A Tennessee case. Sale was made August 30, 1923. Buyer paid one installment. A balance of \$135.00 remained unpaid. Claim was forwarded to a Tennessee firm of attorneys with the advance suit fee and usual instructions that if claim is not fully paid on first demand, please enter suit without delay. Receipt of same was acknowledged by the attorneys on February 29, 1924, together with their assurances that "this matter will have our careful attention."

May 5, 1925: Client wrote attorneys as follows: "On June 24, 1924 we wrote you asking status of the claim and received no reply. Then on July 22nd, 1924, we again wrote you asking for status and received no reply. We wrote you again on March 5, 1925 and received no reply.

Client thereupon reported the matter to the "List" from which he had chosen the attorneys in question. On July 14, 1926 the "List" reported to client that the claim and papers had been procured from the attorneys, but that the attorneys had expressed a desire to retain the claim stating that "suit has been pending on this claim for sometime. . . . We would like to handle this claim to a conclusion." Client thereupon directed that the claim and papers be returned to the attorneys, which was done forthwith.

July 19, 1927. Client to attorneys: "Would you be good enough to give us status in above named claim. It was sent you February 26, 1924, three years four months ago, and surely it ought to come to issue by this time. Thanks for on early reply." On September 15, 1927, client had received no reply.

Case Number Three—An Illinois case. Sale was made July 18, 1924. Claim was forwarded by local attorney for client and claim, papers and advance suit-fee were received by the attorneys December 13, 1924. Instructions were as usual: "If debtor does not pay in full on first demand, you will please commence immediate suit."

December 30, 1924: Forwarding attorney inquired whether demand had been made and if suit had been commenced.

January 5, 1925: Attorneys replied: "We have been after these parties and they say they do not owe one cent, that they had sent this machine back as it was not as represented. Please see if this is true and then tell us what action you want taken and will be governed accordingly."

January 8, 1925: Forwarding attorney in reply: "You can rest assured that the debtor's reasons for failing to pay client cannot

be sustained in any court of law. With this assurance from us, will you be good enough to commence immediate suit?"

January 22, 1925: Forwarding attorney requested copy of attorney's pleadings in the case. No reply.

February 11, 1925: Forwarding attorney's request of January 22, 1925, repeated.

February 15, 1925: Attorneys replied: "We have been trying to get settlement out of this party, but it looks as though he will not pay. We will go on with suit if not paid in a few days. He is a hard case and says he will swear it off and states that he has returned this machine on account it was not to orders. We have filed suit and will thrash it out some way, if he beats us, we will take an appeal to higher court."

March 26, 1925: Forwarding attorney inquired: "Have you commenced suit; what is present status of case?"

March 28, 1925: Attorneys replied: "We have been trying to close this for you, but to date have failed to get a settlement out of them as they say this machine was not as represented. So we will do all we can to close soon for you."

April 6, 1925: Attorneys, apparently without provocation, wrote to the forwarding attorney as follows: "We are after this party for your money and will close same as soon as possible. This is a matter that will have to be thrashed out in court, as you are well aware, and that takes time."

October 31, 1925: Forwarding attorney wrote to the attorneys as follows: "Will you be kind enough to let us know when the same is likely to be reached for trial? In your letter of April 6th, which is the last communication I have received, you stated an action was commenced."

December 14, 1925: Attorneys replied: "We have been working hard on this claim and we will do all we can to close this for you. We hope to be able to close this by the New Year. It is a hard account as this party denies any liability so you can see we have to work on him for you. We will do our best for you in this matter."

March 13, 1926: Forwarding attorney wrote: "I have not heard from you since last December regarding the status of this case. Enclosed you will please find copy of a brief that I have prepared to cover the law affecting the contract client makes with its customers and is applicable to this contract."

Thus stood the case on September 15, 1927.

Case Number Four—An Alabama case. Sale was made May 23, 1923. After requesting and demanding payment of the balance of the purchase price (\$75.00) due from the debtor, client forwarded the claim to a firm of attorneys in Birmingham, Alabama. Attorneys acknowledged receipt of claim, papers, fees and instructions on January 31, 1924. They added to their acknowledgment the following assurances: "This business is now placed in our files and will come around automatically for attention. Our filing system is up-to-date in every particular. Nothing is left to memory, hence nothing is overlooked or forgotten."

February 15, 1924: Attorneys to client: "The case is set for trial for February 23rd."

July 18, 1924: Client to attorneys: "We have written to you on April 23rd, May 27th and again June 24th concerning the status of this case, to all of which we have not been accorded a reply. Claim, \$7.50 advance suit-fee and instructions to sue have been with you since January. Please favor us with a reply."

June 17, 1927: Client to attorneys: "On September 17th, 1924, two years and nine months ago, you wrote us in regard to the above named claim as follows: 'We have had so much trouble and so many fights in court about this claim that we can hardly give you a fair report of it in detail, as it would be useless anyway. However, we have two judgments—one satisfied and the other has been appealed to the circuit court and which will not be tried before the early part of another year. There is no way of preventing a defendant when he wants to give you trouble in the courts of Alabama.'

"We have heard nothing further from you. This claim was sent to you three years and five months ago and surely despite what you say that there is no way to prevent a defendant to give trouble in the courts of Alabama, we cannot conceive that a defendant can go as far as he may please and hold up your courts. We wonder how the people of your state ever get a case settled if such be so. However, you stated in your letter that you have one judgment against the debtor and it has been satisfied; may we ask just what is meant; are we to understand some collection has been made? Gentlemen, your handling of this claim and another of ours which you have does not speak well for you. Now please finish up these cases. Thanks."

This letter by client was sent by registered mail and a return receipt appears to have been signed by the attorneys. Client had received no reply on September 15, 1927.

Case Number Five—A Kentucky case. Sale was made June 27, 1924. Buyer made five payments and stopped. On July 10, 1925 client drew a draft on buyer for two payments in arrears—\$30.00 and costs of \$3.00 making a total of the draft \$33.00. Draft was dishonored by the buyer.

July 29, 1925. Attorney acknowledged receipt of draft and client's instruction to collect. Attorney also reported that "these people are in hard lines, but we will endeavor to serve you the best way possible to bring results."

September 7, 1925: Client to attorney: "We have no desire to press debtors, but they should meet us half way."

"You have the claim for thirty-three dollars; would you be good enough to ask debtors to pay eighteen dollars at once and give you a check dated say October 15th, for the other fifteen dollars."

"Please let us have prompt reply and if no payment, we will send claim for their entire account, which is \$75.00 and instructions to sue."

September 9, 1925: Attorney to client: Acknowledged receipt of client's letter of September 7th and inquired: "Do I understand that this claim is for \$33.00, that is what my docket shows, and is suit authorized? If you do authorize suit, please send advance costs of \$5.00."

September 11, 1925: Client to attorney: "We have yours of September 9th, and replying, would state that the entire balance due us in above-named claim is seventy-five dollars."

"Herewith you will find itemized statement, accompanied with the original contract. You will also find check for \$7.50 covering minimum suit fee. We dislike to sue these people, but they won't do anything toward paying the account, so leave us with no alternative. Suppose you make one more demand, before finally entering suit and if nothing can be done, then go ahead."

December 8, 1925: Client to attorney: "Would you be good enough to advise us when trial of case will come up."

December 10, 1925: Attorney in reply: "We are unable to get a hearing on this case until the January term of court, at which time we trust we will be able to secure judgment. This is the only course to pursue, as letter writing and personal interviews have not accomplished anything."

February 17, 1926: Client to attorney: "Would you be good enough to advise us of the status of our case."

February 19, 1926: Attorney to client: "This case was not reached at the January term as stated in my communication, and for that reason it goes over until the Spring term. I will keep you advised in regard to any developments."

November 5, 1926: Attorney to client: "I have this day collected your account, and after deducting suit fee of \$7.50 and 15% commission of \$4.90, I herewith enclose my check of \$28.10, including advanced cost of \$7.50, which I am returning."

November 8, 1926: Client to attorney: Acknowledged attorney's last letter and continued: "We are herewith returning your check amounting to \$28.10, as same is not correct. The amount of claim sent you was \$75.00. We sent you a suit check of \$7.50; fifteen per cent of \$75.00 is \$11.25 and add your suit fee, and you have \$18.75; deducting that from \$75.00 and there is due us \$56.25. If we are wrong, please enlighten us."

November 10, 1926: Attorney to client: "The remittance is correct as our files show. You directed bank to draw a draft on Mr. Buyer for \$33.00 and this was the basis upon which we made demand, filed suit, obtained judgment, had execution to issue, collected from the officer and rendered you a statement with check on November 5. This is an entire record of the transaction this office has had in connection with you and debtor. We are mailing this check back and if you have any additional claim against this debtor you can render an itemized verified statement and we will see what can be done."

November 13, 1926: Client replied: "Herewith you are handed a copy of a letter you wrote us September 9th, 1925; our reply of Sept. 11th, 1925, with a copy of itemized statement, copy of our letter to you of Dec. 8th, and your reply December 10th, 1925. There seems to be some mix-up in your office files and we trust you will so agree, after having read our letter to you, of Sept. 11, 1925. We sent you but one itemized statement and it calls for \$90—\$75 balance plus 20% attorney's fees as per contract—\$15.00; you must have used this as a basis for your suit. And when you state that the draft for \$33.00 was the basis upon which you filed suit, you certainly did not file suit before receiving the suit fee. We are returning check."

November 15, 1926. Attorney in reply: "The files that you mailed seem to put me in the wrong by your letter of September 11. You must know that the details of business of an office is largely the work of our stenographers and typewriters and while

I am not charging a mistake on their part, the only solution I can make of this transaction is an error in the prosecution of your claim. Now there is nothing left to be done except you take my check and credit your account \$33.00, the amount received by me, and let a copy, verified, come forward and I will take up the matter at once with the debtor. I will do my best."

November 17, 1926. Client to attorney: "Errors are apt to happen. None of us are infallible. We are handing you herewith statement covering balance due on the claim. Please observe that we are entitled to twenty per cent additional, in accordance with the contract, for attorney's fees. Would you be good enough to make just one demand and if not met, proceed with suit." The enclosed itemized statement showed a balance due of \$42.00. Adding 20% attorney's fees, \$8.40, gave a total of \$50.40.

November 20, 1926: Attorney's reply to client: Acknowledged receipt of client's letter and continued: "This concern I know is in a very bad financial condition and no doubt will take time and suit to bring results, and this is not absolutely sure, in this will further advise that our courts will not enforce a contract for the debtor to pay attorney fees, this has been long ended."

November 23, 1926: Client to attorney: "We have yours of Nov. 20th, in which you state that your courts will not enforce a contract for the debtor to pay attorney fees. We have before us a publication which states as follows: 'Attorney's fee of plaintiff for which stipulation is made in Kentucky contract, cannot be recovered in state court. A recent case (*Oman v. American National Bank*, 32 Ky. L. R. 502, 106 S.W. 277) holds that such a contract, if made outside of Kentucky and valid where made, will be enforced in Kentucky. . . . If above is correct, it would appear under the decisions, the attorney's fee in the contract in the instant case should be enforced."

February 5, 1927: Client to attorney: "Would you be good enough to inform us if suit has been instituted."

February 7, 1927: Attorney in reply: "I rather infer from your correspondence that you think this office is responsible for the error in failing to bring suit for the full amount of your claim against this debtor and I must emphasize the fact that my files show that we filed suit for the exact amount which your former account showed was owing, and which was sent to this office for collection. We are proceeding, however, against this debtor and as soon as we get him before the court on the balance due on

your account rendered of \$50.40, but have stricken from that account the attorney fee for which our courts refuse to allow, and will say further that we occupy rather doubtful grounds, in order to show the court under the debtor's plea of payment, that we are entitled to recover as I discovered from the files, as stated above, that the account we sued on showed a balance due and we must make it clear that there was an error and further we will not be able to recover costs in two proceedings on the same account. Later will report the results of my efforts."

June 17, 1927: Client to attorney: "Would you be good enough to give us the status in the above named claim. We sent this claim to you originally in July 1925, close to two years ago. It would appear a claim for such a small amount ought not to take so long to collect."

June 20, 1927: Attorney replied: "Your letter of June 17th received which does this office an injustice. This claim was settled on November 6, 1926, and prompt remittance made on same date. The original claim sent this office was \$33.00 and this settled the entire claim. Now I find from your letter of November 17th, 1926, that you are claiming an additional sum which was not included in our original suit upon which we realized the \$33.00 as stated above. Now this debtor disclaims any further sum than the account originally sent for collection and refuses absolutely to pay anything more. Now, if you wish a suit filed for this sum claimed that was omitted in the original suit you can furnish this office the necessary proof by deposition and will also protect the officers of the court by a deposit of \$5.00 and I will proceed at once, but can give no assurance that we will realize anything additional on your claim."

June 22, 1927: Client to attorney: Reviewed the entire correspondence, calling attorney's attention particularly to attorney's letter to client dated November 15, 1925 and concluded: "You happen to be wrong in this matter and ought to be big enough to make good for the error and not permit a loss to be sustained to another, through a shortcoming of your own. . . . Produce the itemized statement sent you at the time suit was directed, and check for suit fee sent with it and there ends our charge that you are wrong, provided it calls for \$33.00; we have the carbon copy in front of us, so when we offer you a hundred dollars for its production, meaning the original, we could as well make the amount a million. It is up to you to make good. You have the

documents with which to enter suit if you have to; you ask for advancement of costs; if you want the paltry amount sent, check will go to you at once."

Thus rested the case, without reply from the attorney, on September 15, 1927.

Frequently do attorneys blame the congested condition of the court calendars for delays in disposing of cases. Frequently, however, it seems an open question whether the whole blame can be passed to this "catch-all". For example:

Case Number Six—A North Carolina case. Sale was made January 11, 1923. Client's claim against buyer was for \$150.00. When buyer had defaulted in monthly payments amounting to \$90.00, a claim for that amount was forwarded to an attorney. Advance suit fee of \$7.50, \$15.00 attorney's fees and usual instructions were also forwarded. Attorney acknowledged receipt of same on June 28, 1923.

August 29, 1923: Attorney to client: "Trial was had in the above styled case and judgment was rendered for plaintiff. This trial was had before a justice of the peace. I have had judgment duly docketed in superior court. Under our procedure any defendant can appeal from a decision of a justice of peace to the superior court for a jury trial. This defendant has so appealed his case, and which will now have to be tried in the superior court. All cases are heard in the superior court in the order in which they are docketed. Previous to the docketing of this case there are about 1000 cases to be tried, and due to this congested condition I cannot hope to be able to try this case before a year at least."

July 20, 1925: Client to attorney: "In regard to above-named claims, it is over nine months ago, since our last communication with you. Have you any idea when this case will be reached for trial? And as this opportunity presents itself, may it be suggested that you now amend so that the entire purchase price of the machine (\$150.00) be sued on. You have sued for ninety dollars."

July 25, 1925: Attorney replied: "This case has not been heard on the appeal to the superior court. Our dockets are so congested that it takes two to three years to get a case to trial. When the case is reached to be calendared, I will advise you. The suit was for the amount of the installment then due, to wit, \$90.00. I cannot amend at this time the present pending suit as to

include the balance and other installments. This is not allowed by law. The only way to get the other installments now due is by a new and independent action for the remaining installments."

July 27, 1925: Client to attorney: "We are in no hurry about the claim, just so long as we know it is being attended to, and your letter assures us that it is."

On September 15, 1927 client had become suspicious if the 999 cases prior to his, which had been docketed on or before August 29, 1923, might not have been reached in the "one" or "about two to three" years and more that have elapsed.

Case Number Seven—An Indiana case. Sale was made December 1, 1923. Claim was forwarded and received by attorney on February 20, 1924.

June 2, 1924: Attorney to client: "In reply to your letter of May 27th, I brought suit on this claim immediately in Lake Superior court. Defendant appeared by attorney and the case has not yet been tried."

December 18, 1924: Client inquired status of case.

December 22, 1924: Attorney replied: "This case has been set for trial once or twice but was not tried because either the other attorney or myself was busy in another case."

September 18, 1925: Attorney to client: "I got judgment against . . . for \$150.00, I do not know when I will get the money because the defendant filed a motion for a new trial, but this will no doubt be overruled."

January 19, 1926: Client to attorney: "On Dec. 5th we wrote you asking for status in above named claim and not hearing from you, we wrote again on January 5, 1926. Up to present time we have received no reply. We are sending this letter by registered mail, asking for personal receipt, so we may be sure you will be reached and no doubt you want to know whether or not your office employees are giving your correspondence the attention due."

Attorney replied by notation on client's letter as follows: "Motion for new trial filed but has not been ruled on. When I have got money you will hear from me."

April 14, 1926: Client wrote attorney for status of case.

July 2, 1926: Inquiry repeated.

Attorney replied by notation on client's last letter as follows: "Motion for new trial was overruled by the court and the de-

fendant gave notice of appeal to the supreme court of Indiana. This means two or three years delay."

On September 15, 1927 client was about to make another inquiry concerning status of this case.

What redress has client in such cases? Let us observe a single case!

Case Number Eight—A Georgia case. Sale was made January 25, 1923. Attorney acknowledged receipt of claim December 31, 1923. Attorney also stated in this letter that "on undisputed claims it is well-nigh impossible to get money out of this concern and on a claim of this kind it will be possible to do so only after suit and judgment. Reasonable fee for handling the matter would therefore be \$50.00 as it will require a warmly litigated trial of the matter. This being satisfactory, as I presume it will, the matter will be given prompt attention and suit brought to the next term of the Court which convenes in March and will be in order for trial in June." The claim forwarded was for \$150.00.

January 2, 1924: Client to attorney: "We do not believe you will have the slightest difficulty in securing a quick verdict in this case. Debtor is absolutely without defense. Herewith find complete correspondence. . . . We have been in this business over twenty years, and the agreement under which shipment was made to debtor has never been defeated. We are used to paying the regulation 15%, plus a reasonable fee. Suit fee customarily runs from \$7.50 to \$25.00. Your charge brings the total cost to the maximum. However, it is perfectly satisfactory; our understanding being a full charge of \$50.00, if collection is made."

April 23, 1924: Client to attorney: Inquired re status of case: "When in your opinion will trial of case be reached?"

April 26, 1924: Reply: "I have to advise that the suit will be returnable to the June term of the court, but I hardly think that it will be tried at that term and not earlier than September."

May 30, 1924: Attorney to client: "Suit was filed on the 27th inst., returnable to the June term and debtor is beginning to squirm a little. At the last minute he tried his best to persuade me to postpone the filing of the suit, but I thought it best in accordance with your instructions to file the same and then talk settlement. I would therefore be glad to have you advise me at once what is the best possible settlement you would be willing to make in the matter."

June 3, 1924: Client replied: "We will accept \$100.00 and the return of the \$10.00 already advanced to you to apply on the court costs, as full settlement of our claim. By accepting this amount, this you understand will also take care of your fees in the matter. . . . If settlement cannot be effected on that basis, we will desire you to go through with the action and obtain judgment for us. You have a clear case in this matter and we see no reason why debtor cannot be made to pay."

June 5, 1924: Attorney to client. Acknowledged receipt of client's last letter and continued: "I do not think, however, that your proposition is quite clear as set out in the first paragraph owing to the fact that you state you will accept \$100.00 plus \$10.00 costs in full settlement of the claim, but closing with the following: 'By accepting this amount, this you understand will also take care of your fees in the matter. Am I to understand that my fee is to be paid by you out of this \$110.00 or is it to be collected in addition to this amount, which would be merely the collection of the full amount sued for, as my fee is \$50.00. . . . Am I authorized to accept \$125.00 in full settlement of the claim, out of which you are to pay my fee . . . ?"

"I regret to again trouble you in the matter but at the same time, I have found it unsatisfactory to close out matters when the terms of settlement were not fully understood."

June 9, 1924: Client in reply: "The claim as given you was for \$150.00; when you have collected that amount deduct therefrom your fee of \$50.00 as agreed in ours of January 2nd, then mail us your check for the balance of \$100.00. That will be accepted by us as full settlement of the claim. This is the only settlement we will entertain."

August 2, 1924: Client to attorney: "We have before us your letter of May 20th, in which it is stated that suit was filed May 27th, returnable to the June term of court. Would you be good enough to advise us if case came to trial and result of same."

August 5, 1924: Attorney replied: "I have to advise that I will make remittance of \$62.50 on or about the 15th inst., covering this matter, the additional amount of \$12.50 taking care of the delay in making the remittance. This, I trust, will meet with your approval as by so doing I prevented the filing of a defense, but debtor was not in a position to take care of the matter on the date of the filing of the suit and the filing of a defense might have delayed the matter indefinitely. I feel sure that the remit-

tance can be made on or about the time suggested as in the absence thereof I will of course take judgment at the September term of the court."

August 8, 1924: Client replied: "We sent you above-named claim with the understanding your fee for collecting is to be \$50.00; of that amount, you have already received \$10.00, therefore there would be due you forty dollars additional, when claim is satisfied. Under the circumstances, there will be due us \$110.00, therefore we are at a loss to understand what is meant by your statement that you would send us some check for \$62.50."

September 13, 1924: Client to attorney: "Would you be good enough to advise status of above-named claim."

December 18, 1924: Client to attorney: "We are still without replies to our several letters requesting status of this item of collection. We were advised by you that suit had been entered in May, and then later you mentioned the fact, that you hoped to make settlement with debtor in September, and should you not succeed judgment would be taken by you. Please tell us, just what is the status."

December 23, 1924: Attorney replied: "Inclosed herewith you will find my check number 5195 on the . . . bank for the sum of \$41.67 representing a collection of \$62.50 on the above named matter, less my fee of one-third thereon. If we are to realize our money out of this concern the claim will have to be handled very carefully which I am trying to do, as debtor has a large number of claims in the hands of attorneys and I am therefore allowing the suit to pend in the hope of getting a settlement on the matter in the neighborhood of \$100.00, which I think would be an excellent one."

December 26, 1924: Client replied: "We have yours of December 23rd, with a check for \$41.67 which is herewith returned, as we do not understand what you are trying to convey in your letter, and we don't want any misunderstandings. This claim has been with you over a year, and you have written so much to us vaguely that we must confess we are at a loss to understand. The claim is for \$150.00; for collecting it, our understanding is, you are to receive \$50.00. We sent you \$10.00 with the claim; therefore there is due us \$110.00, and that is the amount we want. In regard to you allowing the suit to pend, we do not believe you ought to do so; we care not how many claims are in the hands of

attorneys. We are willing to take chances of gaining judgment, issuing execution and taking the consequences."

January 1, 1925: Attorney replied: "I am in receipt of your favor of December 26th, returning my check for \$41.67, covering the collection made to date on this item, less my fee. I am returning check herewith. At the time this claim was reviewed, I fully advised you of debtor's condition, stating that I cared to handle the claim only on a basis of one-third net to me. This was agreed to by you in replying to my letter. I have, as stated, collected \$62.50, which, less one-third, is the amount of the check enclosed, in accordance with the terms originally named by you for handling the matter. Just as soon as any other collection is made, proceeds of the same, less my fee, will be promptly remitted to you and the matter shall have my careful attention. This is the first time in my experience that I have ever known a creditor not to accept a partial payment, and I fail to see why you should not wish to do so in this matter."

April 25, 1925: Client to attorney: "We have heard nothing further from you since your letter of January 1st, close to four months ago. This claim amounting to \$150.00 was sent to you in December 1923, or sixteen months ago and all you have collected thus far is \$62.50, or less than \$4.00 a month. At that rate to collect \$150.00 will take thirty-seven months. If this is what a merchant should expect in the general course of business, it would take the combined fortunes of Henry Ford and John D. Rockefeller to finance. You ought to get another payment without further delay or close in on debtor. May we have your reply?"

August 15, 1925: Client to attorney: "On April 25th, we wrote you regarding above-named claim but have been accorded no reply. It is our impression therefore that our letter must have gone astray for you surely would have extended us the courtesy of a reply. In that letter we called your attention to not having received any further payment of the claim since May 1925."

October 6, 1925: Client to attorney: "We have not heard from you since January, or nine months ago. We have written you several letters asking for status, but have received no reply, and can only construe that either our letters have not reached you, or possibly due to illness or other cause, you have been unable to reply. This letter is being sent by registered mail and personal receipt requested, sending that way to gain information as to

whether or not our correspondence is reaching its proper destination. Please let us know status of claim."

October 17, 1925: Attorney replied: "I must confess that I am due you an apology for upon an examination of my file I do not find that your last two letters were answered, although I thought they had been. I regret this very much. I really hardly know what to say about this matter as I had the impression from your first letters that you were willing to accept a settlement of the same for less than the full amount and after the filing of suit on the account I agreed with the debtor to accept \$125.00 in full settlement, including the costs, which I thought was an excellent adjustment of the matter. Of this amount \$62.50 has been paid and remittance made to you covering the same. Debtor was to take care of the balance shortly but I have never been able to get any more on this claim. They now contend that after this agreement you accepted the (machine) from the storage company and that this voided their agreement and they are not liable for anything as I stated to them at the time of the agreement that they could receive the (machine) upon the payment of the carriage and storage charges on the same. This therefore brings on a rather difficult problem as your position from the first was that you would under no circumstances accept a return of the (machine). With the matter in this shape I have been hoping to get some adjustment of it, but thus far have been unable to do so. If you have in fact taken back the (machine), then I think that we have already received all that we are entitled to, but if you have not I would appreciate it if you would be so kind as to advise me what disposition has been made of them. I would like to close out the matter if possible as it has been a matter which has given me an endless amount of trouble from the very beginning owing to debtor's financial status and the above matter."

October 19, 1925: Client replied: "Debtor is mistaken. The machine was sold at public auction for storage charges, by the . . . warehouses, . . . Street, this city. It was sold to a Mr. . . ., of . . . Street, this city, on April 20th, 1925. We learned that through Mr. . . . having called us on the 'phone offering the machine to us, but his figure was excessive and we refused to buy. Mr. . . ., when you convey this information to debtor, you are going to have a hard time to collect, not that they are right, but they will refuse to pay. The trouble with this matter is that there has been too much procrastination on your part. At all events,

you adjusted this claim in your own way; through an agreement with the debtor and it is just a question of 'keeping an agreement.' We are helpless in the matter and are entirely in your hands."

December 16, 1925: Client to attorney: "Once more we must write you and it seems disgraceful that so much correspondence is necessary. You have had this claim for two years. On October 17th, 1925, you wrote us that you came to an understanding with debtor that he was to pay you \$125.00 in full payment of the claim; you then and there accepted \$62.50 and the balance was to be paid shortly thereafter. Here is a case where you accepted a man's word and passed it to us. We don't know how you feel about it, Mr. . . ., but the writer, were he in your same position, would treat this as a personal matter and on his honor, would see that the understanding was adhered to. You ought to make this debtor pay up without delay, or close him up. If we are wrong, please enlighten us."

January 5, 1926: Client to attorney: "On October 19th, we wrote you regarding the above-named claim. Not hearing from you, we wrote again on December 16th. Up to the present writing, we have received no reply. May we ask for reply?"

January 22, 1926: Attorney to client: "I have to advise that I am doing my best to get the agreement made with debtor carried out, and I hope that I shall be able to make some definite disposition of the same within the next thirty days, although debtor is without doubt the most unsatisfactory party against whom I think I have ever had any claims. This matter is having my best attention."

July 5, 1926: Client to attorney: "On January 22nd you wrote that you expected to have settlement of above-named claim within the following thirty days. Not hearing from you, we wrote you April 14th, asking for status and up to present writing no reply has been received and it is our impression that our letters are not reaching you.

"We are sending this by registered mail to insure delivery and would thank you to advise us in regard to progress of claim. It has been with you two years and six months and surely, Mr. . . ., it ought to be levelled by this time."

November 11, 1926: Client to attorney: "Time and again have we written to you relative to above-named claim and time and again do you fail to extend to us the common courtesy of

reply. This may sound harsh to you, but you will agree your actions justify harsher writing. On January 22nd, you wrote us you expected to have settlement of the claim within thirty days. This you wrote seven months ago, or rather ten months ago. On April 14th, we wrote you asking for status. You did not reply, so on July 5th, four months ago, we wrote again, sending our letter by registered mail, so there could be no question as to its receipt, and up to present writing you have accorded us no reply. This claim was sent to you December, 1923, close to three years ago. You must confess that is altogether too long. Now Mr. . . ., as said, we may seem a bit harsh, but we believe we are not harsh enough. You sued this claim and wrote us on August 5th, 1924, that if settlement was not made, you would take judgment at the September term of court, referring, of course, to September, 1924. Please take judgment, if you have not settlement and let us have your information that it has been done. Thanks." (This letter was sent by registered mail.)

July 4, 1927: On this date client reported the foregoing case to the American Bar Association and prayed for help!

July 13, 1927: Secretary of The American Bar Association replied to client as follows: "I have your letter of the 4th inst. addressed to 'American Bar Association' referring to the above-named attorney in your claim against . . . of this city. (Attorney, debtor and secretary of the American Bar Association were residents of the same city in Georgia.)

"There is nothing this Association can do in acting upon the complaint you make, as it is beyond our power to force an attorney to answer letters addressed to him. We do have a provision whereby if the grievance committee, after a thorough investigation, finds that an attorney has collected money and does not remit same, or in case of a continued deliberate breach of the professional ethics,¹⁷ upon proper complaint being made and investigated, this Association will appoint an attorney to bring charges in the courts against him. However, you make no such complaint and it is beyond our power to help you any under the present circumstances.

"Notwithstanding, I have had a talk with Mr. . . . and advised him I had your letter making the complaint you did. He advised that he would write you today and fully explain the mat-

¹⁷For an adverse criticism of the utility of these see Levy, *Lawyers and Morals*, Harper's Magazine, volume 154 page 288, December 1926-May 1927.

ter, which I trust will be done. I might say that Mr. . . . is one of the leading attorneys here and bears an excellent reputation as to character, ability and promptness in business matters, handling many out of town claims and this is the first complaint this Association has had within the past five years of any kind, against him."

July 1, 1927: Attorney to client. "Mr. [Secretary of the Bar Association] has just called me by telephone stating that you made complaint to him on account of my failure to answer correspondence touching the above-named claim. You will recall that this matter was adjusted on the basis of a payment of \$125.00 on which \$62.50 was paid by debtor and on which remittance was made to you, less my fee. The understanding was that debtor could recall the shipment which he had returned after the time limit had expired for so doing. When the time came for the second payment he refused to make the same owing to the fact that he was advised by the carrier that the scales had been taken out of storage. I do not think that there is any chance of any further recovery in this matter, and that further correspondence is a needless waste of time and expense in the matter.

"With reference to the failure to answer your correspondence in the matter I have to advise that I may possibly have failed to reply to your last letter but inasmuch as there was no additional information to be given it was possibly overlooked. With this exception, however, I think that all letters to me relative to the matter have been answered with reasonable promptness."

July 16, 1927: Client to Attorney: "We have yours of July 13th, in which you state that this matter was adjusted on the basis of a payment of \$125.00 on which \$62.50 was paid to us, less your fee. And you state you do not think there is any chance of any further recovery in this matter, and that further correspondence is a needless waste of time and expense in the matter. There is nothing in any of our correspondence with you that authorized you to make any settlement of this claim, for less than full satisfaction of the amount of the claim, \$150.00 and if you made any other settlement, you did so on your own responsibility and you must agree, you are responsible to us for any deficiency. We do not agree with you that there is no chance of further recovery; we believe there is an excellent chance. May we ask you to enter judgment against the debtor in the suit pending? After you have done so, advise us that it has been done and we will then take up

with you, the possibility of recovering on the judgment. At least, we are entitled to have the judgment entered."

On August 7th, 1927 client complained of attorney's conduct to the Commercial Law League of America, of which attorney is a member.

On September 15, 1927 two letters from that organization to the attorney concerning the complaint had received no reply.